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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES B. CARRUTHERS, Defendant and Appellant.	G055674 (Super. Ct. No. 16HF1801) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson and Terri K. Flynn-Peister, Judges. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of possessing methamphetamine and driving under the influence with a prior. He contends: 1) The evidence used against him at trial was derived from an unlawful police detention; 2) he was denied his constitutional right of self-representation; and 3) the trial court erred in refusing to dismiss a prior strike conviction he had suffered. We reject these contentions and affirm the judgment.

FACTS

On September 30, 2016, at about 9:30 p.m., Police Officer Paul Riscalia saw appellant drive a Ford Explorer into the parking lot of a storage unit facility in Newport Beach. Because the facility is located in a high-crime area, Riscalia drove into the parking lot to investigate. Appellant drove behind a row of storage units and began pulling up to one of them. However, when he saw Riscalia's squad car, he drove to the opposite end of the units and pulled into a parking stall. He then opened his door and, while still sitting in the driver's seat, began looking around inside his vehicle.

Without using his overhead lights or siren, Riscalia pulled up and parked his squad car perpendicular to the driver's side of appellant's vehicle. There was an empty parking stall between their vehicles, so neither appellant nor his vehicle were blocked in. However, Riscalia kept his headlights on and activated his side spotlight to illuminate appellant's vehicle. Before exiting his squad car, he also ran a record check on appellant's vehicle and learned that it was registered to appellant, who had several prior drug arrests.

Riscalia exited his squad car and walked up to appellant.[1] Appellant was still sitting in the driver's seat of his vehicle with the door open when Riscalia approached him. While standing in the "v" of the door, Riscalia shined his flashlight inside appellant's vehicle and began questioning him. He asked appellant if he had a

[1] In the process of doing so, Riscalia turned on his body microphone, which automatically activated the video recorder on the dashboard of his squad car. Thus, our understanding of the encounter is aided by audio and video evidence that was captured on those devices.

storage unit in the area, and appellant said he was there to help a friend move some belongings. Riscalia then asked appellant if he was on probation or parole and if the dog in his backseat was friendly. After appellant replied the dog was friendly, Riscalia asked him if he had ever been arrested. Appellant said he had a DUI in New Jersey a few years back. However, he denied being on probation, and when Riscalia asked if he had anything illegal on him, he said no.

Riscalia noticed appellant's pupils were constricted, he was sweating, and he had "rotten teeth and decay in his mouth." It also appeared to Riscalia that appellant was speaking rapidly. Suspecting appellant was a drug user and currently under the influence, Riscalia asked him when he last used drugs. Appellant denied using any illegal drugs, and when Riscalia brought up the fact his pupils were constricted, he attributed that to a prescription medication he was taking. Riscalia inquired if he had the medication with him, and appellant began searching in his vehicle.

At that point, Riscalia told appellant not to reach for anything. He also told appellant to "do [him] a favor and keep [his] hands on the steering wheel." When appellant asked what was going on, Riscalia told him he wanted to make sure he was okay to drive and continued to ask him questions. Appellant admitted his driver's license was suspended and there was a knife somewhere in his vehicle. As he and Riscalia were talking, a backup officer arrived on the scene and began looking into the windows of appellant's vehicle with a flashlight. Spotting an open beer in the vehicle, the officer immediately informed Riscalia of his discovery. Riscalia then had appellant step out of the vehicle and asked if he could search him. Appellant said no, so Riscalia just patted him down.

During the patdown, Riscalia felt a plastic bag in the left front pocket of appellant's shorts. The bag had something hard inside, but Riscalia left it for the time being. He then brought appellant to the front of his squad car and ran a records check on

him. After that, he searched appellant's vehicle and seized the open beer his backup officer had spotted.

Riscalia then searched appellant and seized the plastic bag from his pants pocket. Riscalia handed the bag to a second backup officer, and when that officer did not say anything about it, Riscalia told appellant he was going to let him go. But a moment later, the officer informed Riscalia there was a small amount of methamphetamine in the bag, and on the heels of that discovery, appellant admitted he had used methamphetamine that afternoon. Riscalia then took appellant's pulse, and discovering it was "extremely elevated," arrested him and took him into custody.

At the police station, appellant admitted he drank a large beer a couple of hours before he was arrested. He also admitted he used methamphetamine every day and had taken "four hits" of it at around 2:00 p.m. that day. He performed poorly on several sobriety tests that were administered to him, and blood testing revealed he had methamphetamine, cannabis and alcohol in his system.

Appellant was charged with driving under the influence with a prior and misdemeanor possession of methamphetamine. Before trial, he brought a motion under Penal Code section 1538.5 to suppress the evidence that was derived from his encounter with Riscalia, but the trial court denied his motion. He was then convicted by jury of the charged offenses and found to have suffered one prior strike conviction and served six prior prison terms. After declining appellant's invitation to dismiss his prior strike conviction, the trial court sentenced him to 10 years in prison, consisting of 4 years for driving under the influence, plus 6 years for the prison priors.

DISCUSSION

Detention Issue

Appellant contends the trial court erred in denying his motion to suppress. In his view, Riscalia contacted and questioned him in a manner that constituted an illegal detention. We do not see it that way.

The Fourth Amendment to the United States Constitution gives citizens the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" (U.S. Const., 4th Amend.) However, not every encounter between the police and the public implicates that right. Indeed, the United States Supreme Court has made it clear "a seizure does not occur simply because a police officer approaches an individual and asks a few questions" or asks to "examine the individual's identification" or asks for "consent to search[.]" (*Florida v. Bostick* (1991) 501 U.S. 429, 431, 434-435.)

Rather, the seizure of a person – commonly known as a detention – occurs only when the police restrict the person's freedom of movement by means of physical force or a show of authority. (*United States v. Mendenhall* (1980) 446 U.S. 544, 553.) In that situation, the officer must have reasonable suspicion the person being detained has committed or is about to commit a crime. (*Florida v. Royer* (1983) 460 U.S. 491, 498; *In re Tony C.* (1978) 21 Cal.3d 888, 893.) However, if "a reasonable person would feel free 'to disregard the police and go about his business,' [citation] the encounter is consensual and . . . will not trigger Fourth Amendment scrutiny . . . ." (*Florida v. Bostick, supra*, 501 U.S. at p. 434.)

In this case, there is no dispute Officer Riscalia had reasonable suspicion to detain appellant for driving under the influence once he noticed his constricted pupils, sweatiness, bad teeth and rapid speech. Therefore, appellant does not challenge Riscalia's actions after that point. (See *People v. Brown* (2015) 61 Cal.4th 968, 974 [once an officer observes signs of intoxication, a detention to investigate drunk driving is warranted].) The pivotal question is, did Riscalia unlawfully detain appellant *before* he observed those symptoms?

According to appellant, the answer to that question is yes. He cites five factors in support of his claim that Riscalia detained him without reasonable suspicion: 1) Riscalia parked his squad car perpendicularly to his vehicle; 2) he turned his side

spotlight on his vehicle; 3) he approached him while armed and in full uniform; 4) he shined his flashlight in his face; and 5) he asked him if he was on probation or parole.

As for the first factor, we do not believe it is particularly significant whether Riscalia parked his squad car perpendicularly or parallel to appellant's vehicle. What is significant is the fact Riscalia left an empty parking stall between the two vehicles. This allowed appellant plenty of space to either exit his vehicle on foot or back up his vehicle and drive away. As such, the physical positioning of his squad car does not lend support to appellant's detention argument. (See *People v. Perez* (1989) 211 Cal.App.3d 1492, 1496 [no detention found where although the officer parked his squad car near the defendant's vehicle before approaching him, he left ample room for defendant to leave]; *People v. Franklin* (1987) 192 Cal.App.3d 935, 940 [same].)

The second factor – Riscalia's use of his side spotlight to illuminate the driver's compartment of appellant's vehicle – certainly made it obvious appellant was the focus of his attention. Importantly, though, Riscalia did not use his emergency lights or siren at any point during the encounter. Whereas an officer's use of emergency lights or a siren usually constitutes a show of authority that is tantamount to a detention (*People v. Brown, supra,* 61 Cal.4th at pp. 978-980), an officer's use of a spotlight to enhance the visibility of the subject with whom he is dealing typically does not implicate the Fourth Amendment (*People v. Perez, supra,* 211 Cal.App.3d at p. 1496; *People v. Franklin, supra,* 192 Cal.App.3d at p. 940; *People v. Rico* (1979) 97 Cal.App.3d 124, 130).

As appellant points out, Riscalia was also armed and in full uniform when he contacted him in his vehicle. But, as we have noted, the Fourth Amendment does not prohibit police officers from walking up to a suspect and engaging him in conversation, and the line of cases developing that rule generally involves armed, uniformed officers. When Riscalia approached appellant, he did so in a calm and measured fashion. He did not use any intimidating tactics that signaled appellant was not free to leave. (Compare *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111-1112 [detention found where officer

exited his squad car and rushed directly at the defendant while questioning him about his legal status].)

That brings us to the fourth factor cited by appellant, i.e., the manner in which Riscalia used his handheld flashlight. According to appellant, Riscalia "displayed a show of authority and intimidation when he shinned his flashlight directly in appellant's face." Appellant made a similar argument at his suppression hearing in the trial court. However, the trial judge – having reviewed the video recording of the encounter no less than three times – found Riscalia did *not* shine his flashlight in appellant's face. Having reviewed the video recording ourselves, we concur with that assessment. Upon approaching appellant, Riscalia did shine his flashlight inside his vehicle, and the peripheral glare from the light did illuminate appellant's face somewhat. But at no point did Riscalia shine his flashlight directly in appellant's face. In fact, the video shows that while he was conversing with appellant, Riscalia pointed his flashlight down toward the steering wheel, away from appellant's face. Because Riscalia did not use his flashlight in an aggressive or threatening fashion, this factor favors the trial court's ruling that appellant was not unlawfully detained. (See generally *People v. Tully* (2012) 54 Cal.4th 952, 979 [in reviewing a motion to suppress, we must view the evidence in the light most favorable to the trial court's ruling].)

Indeed, the overall atmosphere of the encounter was quite civil in nature. While Riscalia asked appellant if he was on probation or parole, he never raised his voice, displayed his weapon or threatened appellant in any manner. The record indicates Riscalia was simply trying to find out what appellant was doing in a high-crime area at that time of night. In doing so, he observed signs that appellant was under the influence which fully justified his subsequent actions during the encounter. Based on the totality of the circumstances, we do not believe appellant was detained before Riscalia made this observation. Therefore, the trial court properly denied his motion to suppress.

Faretta Issue

Appellant also contends the trial court violated his right of self-representation, as established by the United States Supreme Court in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). The record shows appellant made three requests to represent himself during the course of the case. The first request was granted, the second was denied as equivocal, and the third was denied as untimely. Appellant argues the denial of his second request was error, but we disagree.

Appellant was charged on December 27, 2016 and represented by Deputy Public Defender Rob Flory through his preliminary hearing. In March 2017, appellant filed an ex parte motion to remove Flory "due to irreconcilable differences," so the trial court set a *Marsden* hearing for April 6. (See *People v. Marsden* (1970) 2 Cal.3d 118 [upon request trial courts must give indigent defendants the opportunity to voice complaints about their attorney and appoint new counsel if they can show counsel is not representing them effectively or an irreconcilable conflict has developed between them].) On the 6th, appellant said he wanted to proceed in propria persona, and the court granted his request. However, after three months of self-representation, appellant changed his mind and requested the assistance of an attorney. Therefore, on July 13, 2017, the court appointed Deputy Public Defender Annie Rodriguez to represent him. Trial was set for September 27.

On September 20, appellant appeared for a trial readiness conference before Judge Sheila F. Hanson. At the outset of the hearing, appellant said he was unhappy with Rodriguez and wanted to represent himself. Knowing appellant had done so earlier in the case, and his trial was just a week away, Judge Hanson suspected he might be trying to game the system. To ensure he truly wanted to represent himself, she advised him to discuss the matter with Rodriguez. She also reminded appellant he was entitled to

effective assistance of counsel, and if he felt Rodriguez was not representing him competently, he could ask for a *Marsden* hearing.

After a break in the proceedings, appellant informed Judge Hanson he was no longer seeking to represent himself. Instead, he wanted the court to remove Rodriguez and appoint a new attorney in her stead. Therefore, the court sent the matter to Judge Julian Bailey for a *Marsden* hearing. At the hearing, appellant complained Rodriguez was not doing enough on his case and dragging it out too long. He also admitted that while he was prepared to proceed in propria persona, he "would much rather have a competent attorney" represent him at trial. After hearing Rodriguez's side of the story, the court determined there was no basis to remove her from the case.

The case was then transferred back to Judge Hanson's courtroom, where appellant promptly renewed his request for self-representation. In considering the request, Judge Hanson referred appellant to question 16 on the *Faretta* waiver form he had filed with the court that day. On that question, appellant was asked why he wanted to represent himself, and he wrote: "I don't want to represent myself, I have to. The Public Defender has done *nothing* to help my case."

When Judge Hanson asked appellant if that is how he really felt, he said, "Yes, I feel that I am forced to go pro per because I'm getting no representation from Ms. Annie Rodriguez. We have irreconcilable differences. . . . I'm ready to move forward pro per, though." Considering all of the circumstances, Judge Hanson did not believe appellant had made an *unequivocal* request for self-representation. Therefore, she ordered Rodriguez to remain on as his attorney. Because discovery was still ongoing in the case, she also continued the trial date for one week, to October 4, 2017.

On the 4th, the case was trailed to the following day and assigned to Judge Terri K. Flynn-Peister for trial. On October 5, Judge Flynn-Peister heard pretrial motions and set trial for October 10. As jury selection was about to begin that day, appellant renewed his request for self-representation. Judge Flynn-Peister denied the request as

untimely, and trial commenced the following day. A week later, on October 18, the jury returned its verdict.

Appellant claims Judge Hanson erred in denying his request for self-representation at the trial readiness conference on September 20, 2017. The claim is not well taken.

The right of a defendant to represent him or herself in a criminal case is constitutionally based, but unlike the right to counsel, it is not self-executing. Rather, the defendant must make a timely and unequivocal assertion of that right. (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21 (*Marshall*) [noting courts have deemed the right of self-representation to be waived unless the defendant "'articulately and unmistakably'" demands to proceed in propria persona].) Therefore, "one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself. [Citations.] The court . . . should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court *should draw every reasonable inference against waiver of the right to counsel*, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*Id*. at p. 23, italics added.) In other words, "The right to counsel persists unless the defendant affirmatively waives that right. [Citation.] Courts must indulge every reasonable inference against waiver of the right to counsel. [Citation.]" (*Id*. at p. 20.)

One of the situations in which equivocation is commonly displayed is when, as here, the defendant vacillates between making *Marsden* motions and making *Faretta* motions. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002; *Marshall, supra*, 15 Cal.4th at pp. 21-22.) In that context, the circumstances may reveal a true

desire for self-representation. (See, e.g., *People v. Carlisle* (2001) 86 Cal.App.4th 1382 [while the trial court properly denied the defendant's request for self-representation immediately following the denial of his *Marsden* motion, the court should have granted one of the many such requests he made over the course of the next four months leading up to trial].) But if the defendant's *Faretta* motion is simply made out of frustration with the trial court's decision not to grant him a new attorney, the motion may properly be denied. (*Marshall, supra*, 15 Cal.4th at pp. 21-22.)

The present case falls into the latter category. At the trial readiness conference on September 20, appellant initially told Judge Hanson he wanted to represent himself. But after discussing the issue with his attorney, he changed his mind and requested a *Marsden* hearing, which the court permitted. At the *Marsden* hearing, appellant bluntly told Judge Bailey he "would much rather have a competent attorney" than represent himself. And after his case was sent back to Judge Hanson's courtroom, appellant's request for self-representation was ambiguous at best. In fact, he made it clear he did not really want to represent himself and that the only reason he was seeking to do so is because he did not like his attorney. It is also telling that during a full day of pretrial motions before Judge Flynn-Peister on October 5, appellant said nary a word about wanting to represent himself. As has been noted in several cases, including *People v. Valdez* (2004) 32 Cal.4th 13, 99-101 and *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888-889, a failure to press for self-representation is an indication of a equivocal request. He did make a request for self-representation on October 10, the day before his trial started, but the trial court denied that request as untimely, and appellant does not challenge that ruling on appeal. (Compare *People v. Carlisle, supra,* 86 Cal.App.4th 1382 [trial court erred in denying appellant's multiple requests for self-representation, which he made in a timely fashion following the initial denial of his *Marsden* motion].)

These facts show appellant had ambiguous feelings about the prospect of representing himself. On the one hand, he certainly was not satisfied with his appointed

attorney, but on the other hand, he did not want to go it alone either. Under these circumstances, Judge Hanson properly denied appellant's request for self-representation as being equivocal. (See *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205-1206 [defendant's request for self-representation was rightly denied because it was made out of frustration stemming from the denial of his *Marsden* motion and did not reflect a true desire to proceed without counsel]; *People v. Tena* (2007) 156 Cal.App.4th 598, 608–609 [same].) There is no basis for disturbing that decision.

Sentencing Issue

Lastly, appellant contends the trial court abused its discretion in declining his invitation to dismiss his prior strike conviction. Again, we disagree.

Trial courts are empowered to dismiss a prior strike conviction if it would further the ends of justice. (Pen. Code, § 1385, subd. (a); *People v. Superior Court (Romero)* 13 Cal.4th 497, 507–508.) Under that standard, the court must consider both the constitutional rights of the defendant and the societal interest in ensuring the fair prosecution of criminal cases. (*Id*. at p. 530.) Ultimately, the court must determine "whether, in light of the nature and circumstances of his present felonies and prior [convictions], and the particulars of his background, character, and prospects, the defendant may be deemed outside the [spirit of the Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more [strikes]." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

On appeal, a trial court's refusal to dismiss a prior strike conviction is reviewed for an abuse of discretion – a most deferential standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Indeed, only in "an extraordinary case – where the relevant factors described [above] manifestly support the [dismissing] of a prior conviction and no reasonable minds could differ" would the failure to dismiss constitute an abuse of discretion. (*Id*. at p. 378.)

This is not one of those extraordinary cases. We agree with appellant that the circumstances of his present case are not particularly egregious. However, over the past four decades, appellant has been convicted of over 40 crimes, including 10 felonies and multiple driving under the influence offenses. And several of those convictions occurred between the time of appellant's prior strike conviction, in 2008, and the present case. Appellant's performance on probation and parole has been poor, and it does not appear he has ever availed himself of the many rehabilitation opportunities that have been afforded to him. As the probation officer wrote in her sentencing report to the court, "Considering the number of times [appellant] has been caught driving under the influence, it is fortunate someone has not been killed as a result."

In arguing in favor of leniency, appellant correctly points out that Officer Riscalia told him he was going to let him go after he searched his vehicle. However, that was *before* Riscalia knew there was methamphetamine in the bag he recovered from appellant's pocket, and *before* appellant admitted using methamphetamine before driving. In light of all the pertinent circumstances, we do not believe the trial court abused its discretion in refusing to strike appellant's prior strike conviction.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.